Making and Opposing Motions for Summary Disposition on Serious Impairment of Body Function

By Steven M. Gursten

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After five years and many conflicting decisions, an analysis of MCL 500.3135 as amended by 1995 Public Act 222 remains controversial. Several decisions seem to contradict each other and appellate analysis so far is probably more confusing than consistent while practitioners await final interpretation from the Michigan Supreme Court. Although some Michigan practitioners may remain more eager than others for the final word from the Supreme Court, it remains increasingly clear that all attorneys handling auto negligence cases will probably find themselves making and opposing motions for summary disposition. The intent of this article is not a discussion of the current law; rather, it is to provide practitioners on both sides with useful ideas when making or defending these motions on the issue of impairment.

Impairment, Impairment, Impairment

Any analysis under our new law must focus upon the extent of impairment rather than the underlying injury itself.

MCL 500.3135 (7) can be broken down into a three prong test:

1. "An objectively manifested impairment
2. of an important body function
3. that affects a persons general ability to lead his or her normal life."

The question of whether Plaintiff has sustained a serious impairment of body function is a question of law for the court. In that most basic aspect, the new law does represent a return to Cassidy, as a judge is again making a determination as a matter of law when there is either no factual dispute concerning the nature or extent of Plaintiff's injuries or the court determines that a factual dispute is not material.

Any analysis and argument must start with the extent of impairment. Our new law is less concerned with the type of injury (and in that respect it is most fundamentally different from Cassidy and its progeny) and much more concerned with the nature and extent of the impairment on Plaintiff's ability to lead his or her normal life. Indeed, it is consistently under this third prong of our law that these motions for summary disposition are being granted or denied.

May Findings

The practitioner must make clear to the trial court that granting or opposing these motions requires a considerable amount of work for the bench. May v Summerfield, 239 Mich App 197 (1999) made clear that the court must make its "May findings" a factual record for appellate review as to the extent and nature of Plaintiff's impairments. Practitioners on both sides should therefore be providing to the trial court specific factual findings as to the nature and extent of Plaintiff's impairments. Practitioners may consider providing to the Court these factual findings in an Order for the Judge to use as a checklist when arguing the motion for summary disposition.

> "We all know that complaints of pain are not enough. Pain as a concept is intangible, it creates no tangible real image in peoples minds and it is very possible that every single person in the courtroom may have a different understanding of what pain is. As a Plaintiff practitioner, your job is to make pain real and the most effective way to do this is to demonstrate what the impairments are that your Plaintiff is suffering from. This is also the key to maximizing your damages at trial."

Establishing Impairment

It is not enough to provide an affidavit after Plaintiff's deposition regarding Plaintiff's impairments. The defending Plaintiff's lawyer must spend considerable time with his client before the deposition so the client is ready to testify as to at least 10 or 12 different ways that the injuries have impaired his ability to lead his normal life.

Obviously, the most basic impairment is the length of time disabled from work, although being unable to engage in recreational activities that were important to the Plaintiff before the motor vehicle accident, and even simple things around the house such as problems cleaning or with doing laundry should also be relayed. Plaintiff's should try to explain to her treating doctors, physical therapists, and especially any defense medical examiners what things she is no longer able to do because of her injuries. Plaintiff attorneys should have names of friends, co-workers, and those who have casual yet regular contact with the Plaintiff before the injury (a cashier at the local store, a member of his or her church, etc.) who can relay changes they have observed. These people should be on witness lists, as they make outstanding and very credible witnesses at trial, long after the jury has gotten tired and stopped listening to medical testimony. However, they can also be provided to the court in motions for and against summary disposition in affidavit form or deposition. It should be emphasized to the Court that entire areas of Plaintiff's pre-accident lifestyle have been altered as a result of his or her impairments.

Preparation for summary disposition motions should begin with the initial client meeting. A good lawyer must present to the prospective client a clear understanding of what Michigan law is today. As a Plaintiff practitioner, I must instruct my clients that I feel Michigan law is terribly unfair today in that they can be innocent and in very severe pain everyday, but unless they are able to show differences in pre-accident and post-accident lifestyle they will likely be unsuccessful. Plaintiff attorneys must make sure their clients understand that if he or she is returning to work shortly after an accident (with pain), is resuming the same recreational activities shortly after an accident (with pain), has sporadic or inconsistent medical treatment and poor documentation of his or her injuries, and otherwise is failing to establish how the pain from the injury is actually impairing his or her normal lifestyle, then they will have an unsuccessful case.

For the defense practitioner this means changing how you view these cases. The focus of our law today is not on the type of injury (i.e., fractures are "serious", but "soft-tissue" are not). Focus should be upon the extent of impairment. This means cases that you have normally considered to be very serious, such as fractures and spinal injuries may actually under our new law be considerably less significant, if a Plaintiff is unable to demonstrate impairment as a result of injury. Pain and pain complaints alone are not sufficient under Michigan law. Impairment is, and rightly or wrongly, it is your job to provide the trial court with the proper analysis and framework to look at these cases and not just assume that as a result of the initial injury that they will automatically qualify.

Outside the scope of this article remain important ethical and moral questions. Is our civil justice system today accomplishing what it is meant to, when people with significant injuries who try despite constant pain to work are being unfairly punished? There are also important constitutional questions and equal protection questions that are raised. With our constant focus on impairment today, we must recognize that the same injury may qualify and be worth much more for someone who is, for example, younger and not able to work versus someone who is older and retired. The very same fracture to a construction worker is considerably more valuable than that same fracture to a lawyer who is nevertheless able to return to his job within a couple days of the accident. We must question if higher public policy is being served when our threshold of serious impairment will actually punish the person who is trying to provide for his family and not be fired by continuing to work, while in significant and constant pain.

Making Impairment Real

On some level, every practitioner who goes to trial in auto negligence cases already knows this. We all know that complaints of pain are not enough. Pain as a concept is intangible, it creates no

tangible real image in peoples minds and it is very possible that every single person in the courtroom may have a different understanding of what pain is. As a Plaintiff practitioner, your job is to make pain real and the most effective way to do this is to demonstrate what the impairments are that your Plaintiff is suffering from. This is also the key to maximizing your damages at trial. Ironically, one unintended result of our new law is that in documenting impairment to survive summary disposition, Plaintiff lawyers are increasing the value of their cases.

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To maximize damages and flesh out and document impairment you are only limited by your imagination. These impairments should be provided to the trial court to readily assist the trial court in determining its "May" findings. If Plaintiff or defense counsel is unsure about the actual nature and extent of impairment, there are a wealth of resources that can be turned to.

Functional capacity testing questionnaires, such as the McGill Pain Questionnaire, electronic pain diaries like PIPER that allow an injured person to record throughout the day their levels of pain and how injuries are affecting them, and the AMA Guidelines for Pain and Disability are all available and can be used to help document impairment. Readers may wish to contact a vocational rehabilitation expert for other examples of the type of testing that can be used to document impairment. Such functional capacity testing can be an extremely persuasive and powerful tool for providing the court a sufficient factual basis for granting or denying summary disposition. Moreover, at trial the more that you can impress upon a jury how an actual injury has been impairing a person's normal life, will better assist you in really achieving the best result possible for your clients.

Nursing evaluations, physical therapy questionnaires, surveys and testing can and should be presented to the trial court at motions for summary disposition to support or attack the level of Plaintiff's impairment.

With elderly clients and the unemployed, "time off work" will not establish a period of serious impairment. The Plaintiff practitioner can and should consider pain or grief counselors to establish the long term affects of pain that can depress a person's ability to function in every arena of their life. The same can be said with a psychopharmacologist or pharmacologist to talk about what the different pain medications are, what they mean, the harms and risks that the Plaintiff is exposed to in taking these medications and the long term affects that he or she may be suffering as a result.

Demonstrative aids can and should be brought to these motions for summary disposition. There are wonderful life activity calendars that come in all different shapes, sizes and colors that can graphically and persuasively show the impact of an injury by comparing a person's pre and post-accident lifestyle. Plaintiff and defendant practitioners should also consider demonstrative aids to assist the judge with what the injury really means. It is unfair to assume that every judge has a background as familiar with these injuries as the practitioners who deal with medical issues everyday. When possible and when the opportunity presents, the plaintiff of defense practitioner should make every effort to impress upon the judge the effect of an underlying injury and assist the Court as to why this injury is or is not significant to the Plaintiff.

The Law

Michigan practitioners on both sides should be using the law and applicable jury instructions to buttress their arguments to the Court. Michigan Jury Instruction 36.01 and the applicable case law, SJI 50.10, SJI 50.11, etc. all have important roles when arguing these motions. Particularly for Plaintiff attorneys, these instructions are very helpful in stopping improper defense argument that Plaintiff is doing much better now or that the impairments have ceased to be serious or that Plaintiff had prior pre-existing injuries or problems before the motor vehicle accident.

One important and recent change has been made to MCR 2.116. This court rule provides the basis under which motions for summary disposition are argued and decided. On January 1, 2001, a very important change was made and now evidence for summary disposition must meet the same evidentiary threshold as evidence that would be offered for admission at trial. It is important to remind the Judge that decisions based upon allegations of ambiguous or vague entries in medical records are not a proper basis to decide these motions. Although still controversial in terms of its effect, it is my belief that this new change to the court rule makes it much harder for defense lawyers. It is clear that before they can make these motions, they will have to perform significantly more work throughout discovery and in taking depositions to meet this new evidentiary requirement under MCR 2.116 (which may have the opposite effect and actually increase the value of the Plaintiff's case).

We can therefore anticipate motions for summary disposition will be made after discovery has ended.

Conclusion

Our new law requires more time and more money for all auto cases. There will be fewer cases, but those that survive will have greater value. The burden remains upon practitioners on both sides to respond to their new challenges with creativity and sophistication.

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